I/S: A JOURNAL OF LAW AND POLICY FOR THE INFORMATION SOCIETY

The Right to Be Forgotten v. Free Speech

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From the moment the Court of Justice of the European Union (CJEU) handed down its landmark decision on May 13, 2014, recognizing a right to be forgotten (RTBF), commentators from the United States cast the decision at odds with the freedom of speech.[1] Granting people a right to remove links to old stories about them from Google searches of their names violates the freedom of speech, commentators warned. Indeed, critics blasted the decision as blatant censorship.[2] The cries of censorship escalated when France's data protection authority subsequently ordered Google to extend its

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[1] Case C-131/12, Google Spain SL v. Costeja, 2014 E.C.R. I-317, http://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1033117 . For commentary, see, e.g., Craig Timberg & Sarah Halzack, *Right to Be Forgotten v. Free Speech*, WASH. POST, May 14, 2014, http://www.washingtonpost.com/business/technology/right-to-be-forgotten-vsfreespeech/ 2014 /05/14/53c9154c-db9d-11e3-bda1-9b46b2066796_story.html; Lisa Fleisher, *Google Ruling: Freedom of Speech v. The Right to Be Forgotten*, WALL ST. J., May 13, 2014, http://blogs.wsj.com/digits/2014/05/13/eu-court-google-decision-freedom-of-speech-vs-right-to-be-forgotten/; *see also* Robert Krulwich, *Is The 'Right to Be Forgotten' The 'Biggest Threat to Free Speech on The Internet'?*, NPR, Feb. 24, 2012, http://www.npr.org/blogs/krulwich/2012/02/23/147289169/is-the-right-to-be-forgotten-the-biggest-threat-to-free-speech-on-the-internet.

[2] *See, e.g.*, Marcus Wohlsen, *For Google, the 'Right to Be Forgotten' Is an Unforgettable Fiasco*, WIRED, July 3, 2014, http://www.wired.com/2014/07/google-right-to-be-forgotten-censorship-is-an-unforgettable-fiasco/ ("The censorship of news articles under the abuse of the "right to be forgotten" is just a much more blatant reminder of that fungibility—a reminder that Google would clearly like everyone to just forget.").

removal of links globally to any Google site (not just its European sites) that can be accessed in the EU. Initially, Google refused to comply with the French order on the ground that "no one country should have the authority to control what content someone in a second country can access."[3] Other critics of the French order were even more alarmist: "If Google is forced to comply with the EU rules globally, the result would be unprecedented censorship of Internet content worldwide, as well as a dangerous expansion of foreign regulators' control over what Americans can see on the Web."[4]

The media portrayed this conflict as a clash of two individual rights—the right to be forgotten or, more generally, the right to privacy versus the freedom of speech. The conventional wisdom was that Europe and the United States take opposite approaches in resolving this conflict: "In Europe, the right to privacy trumps freedom of speech; the reverse is true in the United States."[5]

This pithy account of the right to be forgotten is flawed. It masks a far more diverse set of responses countries can adopt in trying to reconcile the potential conflict between the right to be forgotten and the freedom of speech.[6] Indeed, in the European Union, the CJEU decision has been applied in a far more nuanced way—not as an automatic trump, but with free speech interests prevailing in the

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[3] Sam Shechner, *Google Appeals French Order to Apply 'Right to Be Forgotten' Globally*, WALL ST. J., July 30, 2015, http://www.wsj.com/articles/google-appeals-french-order-to-apply-right-to-be-forgotten-globally-1438273521 (quoting Peter Fleischer, Google's global privacy counsel).

[4] James L. Gattuso, *Europe's Latest Export: Internet Censorship*, WALL ST. J., Aug. 11, 2015, http://www.wsj.com/articles/europes-latest-export-internet-censorship-1439333404.

[5] *See* Jeffrey Toobin, *The Solace of Oblivion*, THE NEW YORKER, Sept. 29, 2014, http://www.newyorker.com/magazine/2014/09/29/solace-oblivion; *see also* Charles Arthur, *Explaining the 'Right to Be Forgotten'—the Newest Cultural Shibboleth*, THE GUARDIAN, May 14, 2014, http://www.theguardian.com/technology/2014/may/14/explainer-right-to-be-forgotten-the-newest-cultural-shibboleth.

[6] The scope of removal of a link on Google—EU only or worldwide access—is undeniably a major issue that could heighten the conflict of rights. If Google is required to offer EU citizens a worldwide removal of a link, that expansion would exacerbate the conflict with the freedom of speech by creating negative spillovers, possibly resulting in an undue diminishment of speech for others outside of the EU. However, in February 2016, Google appeared to have worked out a possible fix—applying the removals of links on Google.com for searches conducted in the EU, but not for searches conducted outside of the EU. *See* Barr & Shechner, *infra* note 8 and accompanying text.

majority of right-to-be-forgotten requests made to Google.[7] In February 2016, Google agreed to comply with the French order in a compromise under which Google would remove links from searches across all of its websites (including Google.com) if the search was conducted in an EU country, but the searches on Google.com conducted outside of the EU would still have access to the removed links in searches of the affected person's name.[8] Google's solution appears to avoid the "unprecedented censorship" fears voiced by critics of the French order. Different solutions can be devised in other countries. Even if a U.S. court one day concludes that free speech trumps a right to be forgotten in the United States, the First Amendment is no bar to voluntary industry practices (such as movie ratings and rape shield policies to protect the identities of rape victims).[9] Indeed, Google has already adopted a voluntary—and sensible—policy recognizing what is akin to a right to be forgotten for victims of revenge porn in the United States.[10]

This Essay examines the problem raised when two individual rights conflict—here, the right to be forgotten and the freedom of speech. Building on the literature that analyzes conflicts between individual rights in other contexts,[11] Part I examines the nature of the conflict between the right to be forgotten and the freedom of speech. Part II then maps out alternative ways in which the conflict may be resolved. The resolution includes a broad spectrum of options: (1) categorical trumps favoring one right over the other, (2) rebuttable presumptions in favor of one right, (3) catalogs of situations that favor one right over the other, and (4) multi-factor balancing and other case-by-case decision making. Each of these approaches can be adopted into law by a country, or, alternatively, in voluntary policies

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[7] As of August 19, 2015, Google granted the removal of 41.4% of 1,080,162 links requested for removal, while rejecting 58.6%. *See Transparency Report: European Privacy Requests for Search Removals*, GOOGLE (last visited Aug. 19, 2015).

[8] *See* Alistair Barr & Sam Shechner, *Google Bends to European Pressure on Right to be Forgotten Rule*, WALL ST. J., Feb. 11, 2016, http://www.wsj.com/articles/google-bends-to-european-pressure-on-right-to-be-forgotten-rule-1455231966.

[9] *See infra* notes 61-64 and accompanying text.

[10] *See infra* note 68 and accompanying text.

[11] *See e.g.*, Douglas Laycock, *Tax Exemptions for Racially Discriminatory Religious Schools*, 60 TEX. L. REV. 259 (1982) (equal protection and free exercise of religion); Rodney Smolla, *Information as Contraband: The First Amendment and Liability for Trafficking in Speech*, 96 NW. U. L. REV. 1099 (2002) (privacy and free speech).

by companies like Google and Microsoft that provide search engines to the public. The broad range of options available to countries and companies shows that, even in countries where the freedom of speech is deemed to not permit a legal right to be forgotten, companies can still recognize such a right as a private type of right in their voluntary policies. Part III then recommends that Google adopt an incremental approach for the United States: granting in its user policy a limited right to be forgotten, such as for victims of certain crimes (e.g., rape, incest, domestic violence, kidnapping, sex trafficking, etc.), and continuing to study whether other circumstances warrant a limited right to be forgotten. The incremental approach can also incorporate less-restrictive remedies, such as de-ranking search results over time instead of completely removing them.

I. THE EU RIGHT TO BE FORGOTTEN

This Part explains the landmark decision of the Court of Justice of the European Union that recognized a right to be forgotten and the controversy it sparked. The major concern among critics of the decision is that it will lead to censorship of information on the Internet by making it difficult, if not impossible, to find relevant articles associated with a person.

A. *The Decision*

The EU right to be forgotten was first recognized in a 2014 case brought by Mario Costeja Gonzalez, who filed a complaint with Spain's Data Protection Agency (*Agencia Espanola de Proteccion de Datos* or AEPD), which administers the EU Data Protection Directive in Spain.[12] A Google search of his name resulted in links to two pages

[12] Case C-131/12, Google Spain SL v. Costeja, 2014 E.C.R. I-317, at ¶ 14, *available at* http://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1033117. Some have suggested that the right to be forgotten has historical antecedents in sixteenth century dueling codes and laws in Europe, which enabled people to defend their honor (such as from embarrassing facts) by challenging another person to a duel. *See* Tom Gara, *The Origins of the 'Right to be Forgotten': Sir, I Demand a Duel*, WALL ST. J. (May 14, 2014, 4:00 PM), http://blogs.wsj.com/corporate-intelligence/2014/05/14/the-origins-of-the-right-to-be-forgotten-sir-i-demand-a-duel/; Caroline Winter, *Dueling Gives Way to 'Right to Be Forgotten' on Google*, SFGATE (May 18, 2014, 4:10 PM), http://www.sfgate.com/technology/article/Dueling-gives-way-to-right-to-be-forgotten-on-5487814.php; Caroline Winter, *Dueling, Google, and the 'Right to Be Forgotten'*, BLOOMBERG BUSINESSWEEK (May 16, 2014), http://www.businessweek.com/articles/2014-05-16/dueling-google-and-the-right-to-be-forgotten.

of the Spanish newspaper *La Vanguardia* from January 19, 1998 and March 9, 1998, which included a public notice of an auction of Costeja's house due to his failure to pay social security debts.[13] Costeja claimed that the continuing publication of these old articles about him violated his privacy right under the Directive because "the attachment proceedings . . . had been fully resolved for a number of years and that reference to them was now entirely irrelevant."[14] He asked Google Spain and Google to remove the links from searches of his name and also asked the newspaper to remove the articles containing the public notice of the auction.[15]

On May 13, 2014, the CJEU rendered its landmark decision.[16] The CJEU ruled in favor of Costeja on his claim against Google, but rejected his claim against the newspaper. The Court outlined what has become popularly known as a right to be forgotten:

> [I]f it is found, following a request by the data subject pursuant to Article 12(b) of Directive 95/46, that the inclusion in the list of results displayed following a search made on the basis of his name of the links to web pages published lawfully by third parties and containing true information relating to him personally is, at this point in time, incompatible with Article 6(1)(c) to (e) of the directive because that information appears, having regard to all the circumstances of the case, *to be inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing at issue carried out by the operator of the search engine*, the information and links concerned in the list of results must be erased.[17]

Moreover, "it is not necessary in order to find such a right that the inclusion of the information in question in the list of results causes

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[13] *Google Spain SL*, C-131/12, ¶ 14.

[14] *Id.* at ¶ 15.

[15] *Id.*

[16] *Id.* at ¶ 91.

[17] *Id.* at ¶ 94 (emphasis added).

prejudice to the data subject."[18] Specifically, the Court found that Costeja had established his right to be forgotten: "having regard to the sensitivity for the data subject's private life of the information contained in those announcements and to the fact that its initial publication had taken place sixteen years earlier, the data subject establishes a right that that information should no longer be linked to his name by means of such a list."[19] The Court found no "particular reasons substantiating a preponderant interest of the public in having, in the context of such a search, access to that information."[20]

The CJEU based its holding on the right of "rectification, erasure or blocking of data" under Articles 12(b) and 14(a) of the Data Protection Directive.[21] In doing so, the Court recognized the immense power search engines have in assembling links to articles containing information about people in a way that creates a "detailed profile of him" that is "ubiquitous" on the Internet.[22] Google "enables any internet user to obtain through the list of results a structured overview of the information relating to that individual that can be found on the internet."[23] The end result of the case (after a decision in 2015 from the Spanish court) was that Google removed the links to the articles in question from search results of Costeja's name.[24] After the CJEU decision, Google is no longer the sole decider of people's profiles in Google searches of their names. People in the EU now have a right to remove certain links from searches of their names.

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[18] *Id.* at ¶ 96.

[19] *Id.* at ¶ 98.

[20] *Id.*

[21] *Id.* at ¶¶ 70, 76.

[22] *Id.* at ¶ 80.

[23] *Id.*

[24] *See Spain: RTBF Prevails in High Court Ruling*, DATA GUIDANCE, http://www.dataguidance.com/dataguidance_privacy_this_week.asp?id=3182 (last updated Jan. 28, 2015). Costeja's victory was pyrrhic, at least for himself. Later, the Spanish data protection authority ruled that his right to be forgotten did not extend to subsequent negative comments published online regarding his legal case, given the public interest in the Court of Justice's decision. *See* Miquel Peguera, *No More Right-to-be-forgotten for Mr. Costeja, Says Spanish Data Protection Authority*, STANFORD CENTER FOR INTERNET AND SOCIETY BLOG (Oct. 3, 2015, 8:24 AM), https://cyberlaw.stanford.edu/blog/2015/10/no-more-right-be-forgotten-mr-costeja-says-spanish-data-protection-authority.

B. *The Controversy and Potential Conflict Between Privacy and Speech*

The CJEU's decision sparked controversy as soon as it was announced. Some people hailed the decision as a victory for privacy.[25] Others criticized the decision as censorship.[26] Several U.S. legal commentators argued that the right to be forgotten, if adopted in the United States, would violate the freedom of speech.[27] Several Canadian legal commentators reached a similar conclusion for Canada.[28]

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[25] *See, e.g.*, *Europe 1, Google 0: EU Court Ruling a Victory for Privacy*, SPIEGEL ONLINE (May 20, 2014, 6:58 PM), http://www.spiegel.de/international/business/court-imposes-right-to-be-forgotten-on-google-search-results-a-970419.html; Alan Travis & Charles Arthur, *EU Court Backs 'Right to Be Forgotten': Google Must Amend Results on Request*, THE GUARDIAN (May 13, 2014, 9:06 AM), http://www.theguardian.com/technology/2014/may/13/right-to-be-forgotten-eu-court-google-search-results ("The ruling confirms the need to bring today's data protection rules from the 'digital stone age' into today's modern computing world.") (quoting EU justice commissioner, Viviane Reding).

[26] *See*, *e.g.*, Matt Ford, *Will Europe Censor this Article?*, THE ATLANTIC (May 13, 2014), http://www.theatlantic.com/international/archive/2014/05/ europes-troubling-new-right-to-be-forgotten/370796/ ("Is Google required to start censoring large swathes of the web? Are they required to build a complex censorship engine to block true information that a court has ruled must not be linked to? It's crazy.") (quoting Jimmy Wales, founder of Wikipedia); Dave Lee, *What Is the 'Right to Be Forgotten'?,* BBC NEWS (May 13, 2014), http://www.bbc.com/news/technology-27394751 ("We need to take into account individuals' right to privacy but if search engines are forced to remove links to legitimate content that is already in the public domain but not the content itself, it could lead to online censorship.") (quoting Javier Ruiz, policy director of Open Rights Group); Olivia Solon, *EU 'Right to Be Forgotten' Ruling Paves Way for Censorship*, WIRED.CO.UK (May 13, 2014), http://www.wired.co.uk/news/archive/2014-05/13/right-to-be-forgotten-blog ("This decision is a ridiculous one that threatens to censor entire swathes of the web."); Danny Sullivan, *Thanks to "Right to Be Forgotten," Google Now Censors the Press in the EU*, MARKETING LAND (July 2, 2014, 4:11 PM), http://marketingland.com/eu-right-to-be-forgotten-censorship-89783.

[27] *See* NEIL RICHARDS, INTELLECTUAL PRIVACY: RETHINKING CIVIL LIBERTIES IN THE DIGITAL AGE 91-92 (2015); Toobin, *supra* note 5 ("The American regard for freedom of speech, reflected in the First Amendment, guarantees that the Costeja judgment would never pass muster under U.S. law. The Costeja records were public, and they were reported correctly by the newspaper at the time; constitutionally, the press has a nearly absolute right to publish accurate, lawful information.").

[28] *See* Andre Mayer, '*Right to Be Forgotten': How Canada Could Adopt Similar Law for Online Piracy*, CBC NEWS TECHNOLOGY & SCIENCE (June 16, 2014, 4:14 PM), http://www.cbc.ca/news/technology/right-to-be-forgotten-how-canada-could-adopt-similar-law-for-online-privacy-1.2676880 (last updated June 18, 2014, 3:42 PM) ("David

In the EU, the controversy raises a potential conflict between two fundamental rights: the right to privacy and the freedom of expression.[29] The EU has allowed restrictions of speech—such as hate speech—which U.S. law does not allow.[30] Given the EU's approach to speech and restrictions, perhaps it was not surprising that the CJEU balanced the public's interest in access to the information with the individual's privacy interest in a right to be forgotten.

Other countries may not necessarily view the issue in the same way as the EU. In the United States, the right to privacy is less robust, so it is perhaps doubtful that it encompasses a right to be forgotten as a constitutional right.[31] If it does not, Congress could create a statutory right to be forgotten, in which case the potential conflict would involve the constitutional right of free speech versus a newly created statutory right to be forgotten. Alternatively, courts could develop a right to be forgotten under the common law, although it does not fit neatly within the existing privacy torts.[32]

Fraser, an internet and privacy lawyer with the Halifax firm McInnis Cooper, doesn't believe this could be implemented in Canadian law, because the Charter of Rights and Freedoms 'has a guarantee of freedom of expression—we don't have a guarantee of your right to be forgotten.'").

[29] *See* Case C-131/12, Google Spain SL v. Costeja, 2014 E.C.R. 317, at ¶¶ 58, 68 http://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1033117 (privacy); Council of the European Union, *EU Human Rights Guidelines on Freedom of Expression Online and Offline* (May 12, 2014), http://eeas.europa.eu/delegations/documents/eu_human_rights_guidelines_on_freedom_of_expression_online_and_offline_en.pdf ("The right to freedom of expression includes freedom to seek and receive information.") [hereinafter *EU Human Rights Guidelines*].

[30] *See EU Human Rights Guidelines*, *supra* note 29, at 27.

[31] *See* Sherry F. Colb, *The Qualitative Dimension of the Fourth Amendment "Reasonableness"*, 98 COLUM. L. REV. 1642, 1643 (1998) (The Constitution does not expressly recognize a right of privacy, but the Supreme Court has recognized substantive privacy rights in the Due Process Clause of both the Fifth and Fourteenth Amendments, and a procedural privacy interest in the Fourth Amendment's prohibition against "unreasonable searches and seizures.").

[32] *See* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960) (identifying intrusion of an individual's private affairs, public disclosure of embarrassing private facts, false light of an individual, and appropriation of plaintiff's name or likeness as four privacy claims recognized under tort law). The right to be forgotten might be analogized to the tort for public disclosure of an embarrassing fact, but the right to be forgotten deals with public disclosures of personal information that is already published (and typically legitimately so), but later becomes excessive, inadequate, or outdated.

Of course, one would expect such a RTBF law to face a First Amendment challenge. Google can assert a First Amendment right in its search results, a view supported by several district court decisions.[33] Google could argue the right to be forgotten violates Google's speech by forbidding it from displaying certain search results related to a search of a person's name. Also, the publishers of the stories whose articles are delisted on Google from searches of a person's name can raise a First Amendment challenge because the removal of links to their articles on Google makes it more difficult for people to find their articles.

Finally, members of the public could assert that their First Amendment rights have been infringed by the right to be forgotten because of the restriction on their ability to access publicly available information. The theory would be that once information is lawfully in the public domain, the government cannot restrict access to it. Although the underlying articles related to a person are still online, the public's ability to find or access the information through a Google search is denied. The Supreme Court, however, has tended to avoid viewing First Amendment controversies in terms of a right to access the public domain or public records.[34] In *Golan v. Holder*, a case in which Congress granted restored copyrights to foreign works that had been in the public domain, the Court rejected the argument "that the Constitution renders the public domain largely untouchable by Congress," at least in the case of restrictions imposed by copyrights.[35] Several First Amendment cases recognize the right to publish

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[33] *See* Zhang v. Baidu, 10 F. Supp. 3d 433, 436-37 (S.D.N.Y. 2014); Langdon v. Google, Inc., 474 F. Supp. 2d 622, 629-30 (D. Del. 2007); Search King, Inc. v. Google Technology, Inc. 2003 WL 21464568, at *3 (W.D. Okla. May 27, 2003). For commentary, see James Grimmelmann, *Speech Engines*, 98 MINN. L. REV. 868 (2014); Stuart Minor Benjamin, *Algorithms and Speech*, 161 U. PA. L. REV. 1445 (2013); Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1495 (2013); Michael J. Ballanco, Comment, *Searching for the First Amendment: An Inquisitive Free Speech Approach to Search Engine Rankings*, 24 GEO. MASON U. C.R.L.J. 89 (2013); Eugene Volokh & Donald M. Falk, *Google: First Amendment Protection for Search Engine Results*, 8 J.L. ECON. & POL'Y 883 (2012); Eugene Volokh & Donald M. Falk, *First Amendment Protection for Search Engine Search Results*, 23 No. 1 COMPETITION: J. ANTI. & UNFAIR COMP. L. SEC. ST. B. CAL. 112 (2014); Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149 (2008).

[34] *See* McBurney v. Young, 133 S. Ct. 1709, 1718 (2013) ("This Court has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws.").

[35] Golan v. Holder, 132 S. Ct. 873, 891 (2012).

information that a person did not obtain unlawfully—such as from a public police report, judicial records, and even someone else's illegal interception—but these cases are not framed in terms of the public's right to access the information.[36]

Regardless of which type of challenger is involved, the conflict would involve an asserted First Amendment right versus a statutory or common law right to be forgotten. In this type of conflict, the freedom of speech may start out with an edge, given its higher status as a constitutional right. Constitutional rights, however, are not absolute.[37] So, just as in the case of a conflict between two constitutional rights, there is still a need to decide how to resolve the conflict. This conflict pits privacy against speech.

II. THE METHODS OF RECONCILING OR RESOLVING THE CONFLICT BETWEEN THE RIGHT TO BE FORGOTTEN AND FREE SPEECH

This Part lays out several methods that countries and companies can adopt to resolve potential conflicts between two individual rights—specifically, the right to be forgotten and the freedom of speech. This Part does not endorse any particular method, but, instead, is meant to illustrate the variety of alternatives available. The options are numerous and more nuanced than simply choosing one right over the other.

A. *Caveats*

Before discussing how countries can resolve the conflict between the right to be forgotten and the freedom of speech, a few caveats are in order. The framework outlined below sets forth a general theory that is not tied to a particular country's law. This general approach has limitations.

First, the text of the law in question, a court's interpretive method, and a country's jurisprudence all may influence—and possibly constrain—a court's resolution of a possible conflict between two individual rights. For example, a constitution or treaty might say

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[36] *See, e.g.*, Bartnicki v. Vopper, 532 U.S. 514 (2001); The Florida Star v. B.J.F., 491 U.S. 524 (1989); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

[37] *See* Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 91 (1989) ("Because no constitutional rights are absolute, virtually every constitutional case involves the question whether the government's action is justified by a sufficient purpose.").

nothing at all about such conflicts; the U.S. Constitution, for example, does not. By contrast, the law in question may anticipate potential conflicts and set forth guidelines on how to resolve such conflicts. Article 10 of the European Convention on Human Rights (ECHR) recognizes a freedom of expression that is qualified in the second paragraph:

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, *for the protection of the reputation or rights of others*, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[38]

The ECHR also recognizes limitations to the right of privacy:

> There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or *for the protection of the rights and freedoms of others*.[39]

The European Court of Human Rights has required any exception (1) to be set forth and circumscribed by law, (2) to be for one of the legitimate purposes listed in the paragraphs above, and (3) to be proportional.[40] Although the ECHR is not EU law, the EU Charter

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[38] European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10, opened for signature Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) (emphasis added).

[39] *Id.* at art. 8 (emphasis added).

[40] *See* Amann v. Switzerland, 245 Eur. Ct. H.R. at 266 (2001); Francesca Bignami, *The Case for Tolerant Constitutional Plagiarism: The Right to Privacy Before the European Courts*, 44 CORNELL INT'L L.J. 211, 219-20 (2008).

adopts a similar approach to limitations of rights in Article 52 and expressly treats corresponding rights in the ECHR as the same in meaning and scope.[41]

By contrast, U.S. courts have no guidance from the text of the Constitution on how to resolve potential conflicts among constitutional rights, and, arguably, may have greater discretion in resolving a potential conflict between two rights—such as speech and privacy, or the free exercise and the establishment of religion.[42]

Another factor that may influence the resolution of a potential conflict is the hierarchy, if any, of relevant laws. When two rights are both fundamental and constitutional, the court's task may be more difficult because both rights are (presumably) of equal stature. Favoring one right over the other would seem to undermine the other right. By contrast, if one right has a higher status than another, such as a fundamental right versus a lesser right, or a constitutional right versus a statutory or non-constitutional right, a court might tend to favor the higher right. Yet, even in the latter type of conflict, most fundamental or constitutional rights are not considered absolute.[43] So, a court must still consider whether the non-constitutional right passes constitutional scrutiny or is justified as consistent with or as an exception to the constitutional right.

Although the text of the law in question, a court's interpretive method, a country's jurisprudence, and hierarchy of law are all, undoubtedly, important in deciding how to resolve a potential conflict between individual rights, this essay puts aside these factors in the following analysis. Instead of examining a particular country's law, the essay aims to speak generally about resolving a conflict between privacy (i.e., the right to be forgotten) and free speech—based on the assumption or expectation that many countries will face this same question. Nonetheless, the essay uses examples from the EU and U.S. for illustrative purposes.

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[41] *See* Charter of Fundamental Rights of the European Union, art. 52 (1), (2), 2010 O.J. C 83/389.

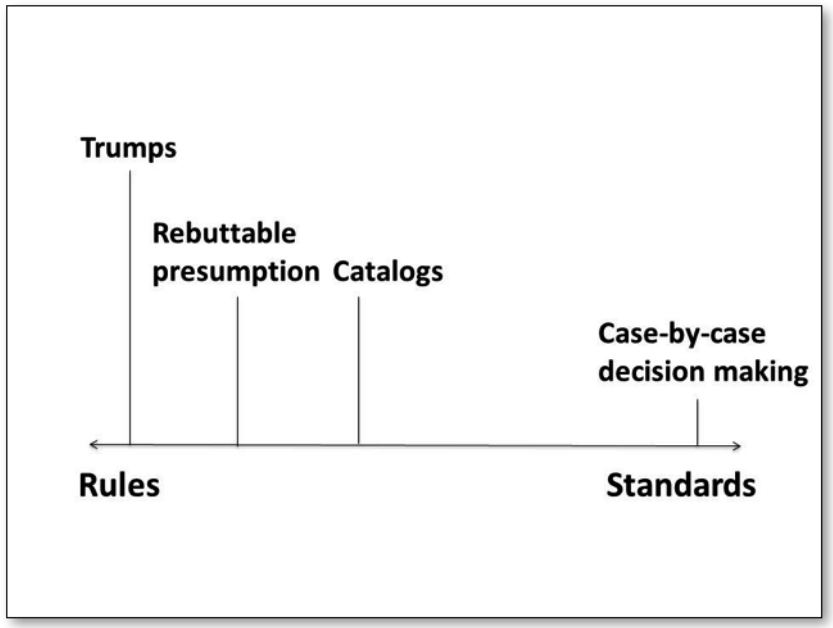
[42] *See supra* note 11.

[43] *See* Mark Rosen, *When Are Constitutional Rights Non-Absolute? McCutcheon, Conflicts, and the Sufficiency Question*, 56 WM. & MARY L. REV. 1535, 1554-59 (2015); Stephen Gardbaum, *A Democratic Defense of Constitutional Balancing*, 4 L. & ETHICS HUM. RTS 78, 87-89 (2010).

B. *Public Law Solutions*

As depicted in Figure 1, countries can resolve the potential conflict between the right to be forgotten and the freedom of speech in a variety of ways. The first set of solutions involves state action setting forth a resolution by law. These solutions should be viewed as representing a spectrum of options with varying degrees of how rule-like or standard-like they are.[44] A rule sets forth the outcome in advance, while a standard allows greater discretion and decision making on a case-by-case basis.

Figure 1. Spectrum of Methods to Resolve Conflict of Rights



[44] There is extensive literature on rules versus standards. *See, e.g.*, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687-713 (1976); Frank I. Michelman, *A Brief Anatomy of Adjudicative Rule-Formalism*, 66 U. CHI. L. REV. 934, 936-37 (1999); Eric A. Posner, *Standards, Rules, and Social Norms*, 21 HARV. J.L. & PUB. POL'Y 101 (1997); Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781 (1989); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176 (1989); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985); Kathleen M. Sullivan, *Foreword—The Supreme Court, 1991 Term: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 27-56 (1992); Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 956-57 (1995).

1. *Trump in Favor of One Right*

The simplest solution to any conflict between the RTBF and free speech is to favor, as a categorical rule, one right over the other. This resolution can be characterized as a trump. One right trumps the other.[45]

If the RTBF always prevails, then the trump may limit free speech by limiting (1) search engines' search results, (2) access to publishers' articles, and (3) people's access to a link to an article containing personal information of the person invoking the RTBF. This trump does not destroy or deny people's free speech right altogether. People still retain their free speech rights, although their access to certain links resulting from Google searches of certain people's names may be more limited.[46] The CJEU came close to adopting this categorical approach by describing the RTBF as a "rule":

> As the data subject may, in the light of his fundamental rights under Articles 7 and 8 of the Charter, request that the information in question no longer be made available to the general public by its inclusion in such a list of results, it should be held, as follows in particular from paragraph 81 of the present judgment, that those rights override, *as a rule*, not only the economic interest of the operator of the search engine but also the interest of the general public in finding that

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[45] The "rights as trumps" idea was a large part of Ronald Dworkin's influential theory. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 329 (2011). For a critique of Dworkin's theory, see Rosen, *supra* note 43, at 1543-53.

[46] Some groups have tried to counter RTBF removals by collecting, identifying, and publicizing links that have been removed from Google. *See, e.g.*, Jeff John Roberts, *"Hidden from Google" Shows Sites Censored under EU's Right-to-Be-Forgotten Law*, GIGAOM (July 16, 2014), https://gigaom.com/2014/07/16/hidden-from-google-shows-sites-censored-under-eus-right-to-be-forgotten-law/. The UK data protection authority subsequently ordered Google to remove links to news articles that reported some of the links Google had already removed pursuant to RTBF requests. *See* Samuel Gibbs, *Google Ordered to Remove Links to 'Right to Be Forgotten' Removal Stories*, THE GUARDIAN (Aug. 20, 2015), http://www.theguardian.com/technology/2015/aug/20/google-ordered-to-remove-links-to-stories-about-right-to-be-forgotten-removals.

> information upon a search relating to the data subject's name.[47]

In the very next sentence, however, the Court backed away from the "rule" and instead recognized a need to consider the countervailing interest of the public in accessing the information in the article: "[T]hat would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of inclusion in the list of results, access to the information in question."[48] As discussed later, Google has interpreted the decision to require case-by-case balancing of interests.

By contrast, if free speech always prevails, it destroys or denies the RTBF altogether. Privacy survives as a general right, but it is powerless to command, by law, a search engine to remove a link from a search of a person's name for RTBF reasons. In other words, the RTBF is just not possible if free speech always prevails. Critics like Professor Jonathan Zittrain, who argue that the RTBF would violate the freedom of speech in the U.S., envisage free speech as a trump.[49] U.S. Supreme Court precedent does lend some support for this view, with the Court tending to favor free speech over privacy in most, if not all, cases in which the two interests have been implicated.[50]

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[47] Case C-131/12, Google Spain SL v. Costeja, 2014 E.C.R. 317 at ¶ 97, http://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1033117 (emphasis added).

[48] *Id.*

[49] *See, e.g.*, Jonathan Zittrain, *Don't Force Google to "Forget"*, N.Y. TIMES, May 14, 2014, http://nyti.ms/1gppWAR.

[50] The Court has tended to favor the publication of speech over privacy or confidentiality interests. *See, e.g.,* Bartnicki v. Vopper, 532 U.S. 514, 535 (2001); The Florida Star v. B.J.F., 491 U.S. 524, 533 (2000); Smith v. Daily Mail Publishing Co., 443 U.S. 97, 102 (1979); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam). In these cases, the Court typically applies strict scrutiny to the restriction of speech. *See, e.g.*, *Bartnicki*, 532 U.S. at 528 (requiring a state "need … of the highest order" before the state can punish publishing truthful information on a matter of public concern). Although these cases stop short of holding that free speech generally trumps privacy, the results have all favored free speech over privacy interests. *See* RICHARDS, *supra* note 27, at 47.

2. *Presumption in Favor of One Right*

Closely related to the first approach is a country's recognition of, not a trump, but a presumption in favor of one right that may be rebutted or departed from in some cases. The presumption, itself, may be strong, medium, or weak. A strong presumption would mean that, in most cases, the right favored by the presumption would prevail. A weak presumption, on the other hand, would allow a greater number of departures.

A strong presumption may be viewed as a trump, subject to an exception for exigent circumstances. Some of the U.S. Supreme Court's First Amendment jurisprudence follows this approach.[51] The Court typically leaves open the possibility for an exception even while recognizing a strong protection for the freedom of speech.[52] In most cases, free speech prevails. By contrast, a weak presumption allows more varied outcomes. The reasons for departure may be less exigent, but may, nonetheless, provide a sufficient basis to override the presumption in favor of one right.

3. *Catalogs of Situations with Certain Outcomes*

A third way to deal with the potential conflict between the RTBF and free speech is to enumerate a catalog of factors or factual scenarios that produce certain outcomes.[53] This third approach mirrors the earlier two approaches (trumps and presumptions), but on a micro level. Instead of resolving the conflict across the board on a macro level, the third approach decides the issue factor-by-factor, or factual scenario-by-factual scenario.

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[51] *See, e.g.*, Smith, 443 U.S. at 102 ("[S]tate action to punish the publication of truthful information seldom can satisfy constitutional standards.").

[52] *See, e.g.*, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491 (1975) ("Rather than address the broader question … whether the State may ever define and protect an area of privacy free from unwanted publicity in the press, it is appropriate to focus on the narrower interface between press and privacy that this case presents, namely, whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records….").

[53] For a theory to justify the use of catalogs, see Gideon Parchomovsky & Alex Stein, *Catalogs*, 115 COLUM. L. REV. 165, 168 (2015) ("A catalog, as it is defined in this Essay, consists of an outright ban on a detailed, but incomplete, list of specific activities and a general prohibition of all activities falling into the same category.").

For example, imagine that a country decided that the RTBF trumped free speech in the following scenarios:

1. The link is to an article over five years old that discusses how the individual or her family was the victim of a crime of violence;

2. The link is to an article that discusses an individual's serving of a prison sentence, even though the individual has served the entire prison term in a country that recognizes expungement of criminal records upon completion of prison terms; or

3. The link is to an article that discusses an embarrassing act committed when the individual was a minor.

Thus, for each factor, the RTBF effectively trumps whatever free speech rights exist in the link to the information resulting from a search of a person's name. The catalog of factors essentially operates as a set of trumps, each for a specific scenario. Conversely, we can enumerate a list of factors that operate as trumps in favor of speech, such as whether the person is a public figure or official, or whether the issue involves a matter of public concern.

Alternatively, instead of trumps, the enumerated factors could be considered presumptions subject to exceptions. The exceptions themselves may be enumerated in advance. For example, the first factor above might be subject to an exception if the individual or individual's family included a public figure. As Figure 1 above depicts, trumps, presumptions, and catalogs fall along a spectrum that is more rule-like in approach, with trumps operating as the most rule-like. Trumps, presumptions, and catalogs set forth outcomes in advance to respectively decreasing degrees. An absolute trump should result in 100% the same outcome for every case, no matter the circumstance. Presumptions and catalogs, on the other hand, will favor one right over the other, but in less than 100% of the cases.

4. *Case-by-Case or Open-Ended Decision Making*

The fourth way to reconcile the conflict between RTBF and free speech is to delegate the decision for a tribunal to decide on a case-by-case basis. Of the four approaches, this approach leaves open the greatest discretion for the court or tribunal to decide the conflict for each claimant. Instead of resolving the conflict ex ante for a broad set

of cases, the resolution of the controversy is left to each individual case. This approach is often characterized as a resort to "standards."[54] The case-by-case method can be purely fact-specific, leaving the tribunal to decide each case simply on the facts. More commonly, though, the case-by-case method is informed by a list of factors that the tribunal should consider in each case. For example, in deciding the RTBF, one may consider the nature of the information, how old the information is, and whether it involves a public figure on a case-by-case basis.

By the available accounts, the process that Google has adopted most closely resembles the case-by-case method guided by a list of factors.[55] Google's external Advisory Council proposed a list of factors for Google to consider, as did the EU's Article 29 Working Party.[56] Google's approach appears to be justified by the CJEU's decision, which stated that one must determine if the information is "inadequate, irrelevant or no longer relevant" by "having regard to all the circumstances of the case."[57] Still, it appears that, from its experience in case-by-case decision making, Google has also developed a body of case law—what it calls "a rich program of jurisprudence"—that may lend itself to the recognition of a catalog of fact scenarios that produce certain outcomes in favor or against the RTBF claim.[58] From a free speech standpoint, case-by-case standards may be more troubling if they do not give adequate notice to the public on what is proscribed, thereby leading to a chilling of speech or

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[54] *See supra* note 44 and accompanying text.

[55] *See* Edward Lee, *Recognizing Rights in Real Time: The Role of Google in the EU Right to Be Forgotten*, 49 U.C. DAVIS L. REV. 1017, 1037-40 (2016).

[56] *See Report of The Advisory Council to Google on the Right to Be Forgotten*, GOOGLE (Feb. 6, 2015), https://drive.google.com/a/kentlaw.iit.edu/file/d/0B1UgZshetMd4cEI3SjlvV0hNbDA/view; Guidelines on the Implementation of the Court of Justice of the European Union Judgment on "Google Spain and Inc. v. Agencia Espanola de Proteccion de Datos (AEPD) and Mario Costeja Gonzalez", C-131-12 ARTICLE 29 DATA PROTECTION WORKING PARTY, Nov. 26, 2014.

[57] Case C-131/12, Google Spain SL v. Costeja, 2014 E.C.R. 317, at ¶ 94, *available at* http://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1033117.

[58] *See* Natasha Lomas, *Call for Google to Show Its Right to Be Forgotten Workings*, TECHCRUNCH, May 14, 2015, http://techcrunch.com/2015/05/14/call-for-google-to-show-its-right-to-be-forgotten-workings/ (quoting Peter Fleischer, Google Global Privacy Counsel).

self-censorship, or if they give too much discretion to the decision maker, resulting in arbitrary decisions.

C. *Solutions by Private Norms and Ordering*

The second set of solutions consists of private solutions selected by Google or other companies on their own, without the command of law. This approach may be more suitable for countries that do not already recognize a RTBF by law. Instead of a country recognizing a RTBF by law, Google and other companies can recognize a private RTBF in their policies, practices, or technological design. One advantage that a private solution yields is that it avoids state action. Thus, if, as in the United States, the right to free speech does not apply to speech restrictions by private actors, a private solution may offer a way to strike a balance between privacy and speech without raising any constitutional problem.[59] Even in those countries where a RTBF law would violate free speech rights, a private RTBF, voluntarily adopted by companies, may present a viable alternative. Of course, private restrictions on speech or private censorship may be troubling in their own right (or even prohibited in some countries), so it is still necessary to debate the desirability of a private RTBF along with its feasibility.

1. *Best Practices on Privacy and Speech*

Instead of the state resolving the potential conflict between the RTBF and free speech, companies could resolve the conflict on their own. The search engines would have the same range of options as states do to resolve the conflict—by using trumps, presumptions, catalogs, or case-by-case decision making. If a company adopted a trump, presumption, or catalog as its policy, it probably would be hard for the company to avoid some level of case-by-case decision making in order to process requests, unless the search engine incorporated its approach into its algorithm for the search results.

Private solutions to legal controversies are common in other contexts. For example, in several countries, the movie and music industries have convinced Internet service providers to adopt voluntary agreements that impose "graduated response" or "six strikes" policies on their users who allegedly engage in copyright

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[59] *See* Christopher Witteman, *Information Freedom, A Constitutional Value for the 21st Century*, 36 HASTINGS INT'L & COMP. L. REV. 145, 227 (2013).

infringement.[60] Although these graduated response policies are controversial, they represent a private ordering response to copyright infringement that operates outside the dictates of copyright law, the First Amendment, and the courts.

Closer to the RTBF issue, media companies in the United States have several longstanding, voluntary policies that probably would violate the freedom of speech if they were enacted by the state. First, the movie industry in the U.S. adopted a ratings system for movies starting in 1930, which restricts children's and teenagers' access to movies based on their content.[61] The current ratings system is administered by a private agency, the Classification & Rating Administration (CARA).[62] Second, nearly all U.S. newspapers and news organizations have voluntary rape shield policies, according to which they will not disclose or broadcast the names of victims of rape (even if the information is publicly available from court proceedings).[63] Both the movie ratings system and the media's rape shield policy are well-accepted industry practices today that probably few people object to. If a law required entities to adopt such policies in the U.S., the law would likely violate the freedom of speech.[64] Without state action, the industry policies currently in force avoid this constitutional difficulty.[65]

Thus, a private solution to the RTBF-free speech dilemma may offer an alternative to RTBF laws that a country deems to violate free speech. Even if a country concludes that a RTBF law is an unconstitutional abridgment of speech (i.e., free speech trumps the

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[60] *See* Annemarie Bridy, *Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement*, 89 OR. L. REV. 81 (2010).

[61] *See* Jacob Septimus, *The MPAA Ratings System: A Regime of Private Censorship and Cultural Manipulation*, 21 COLUM.-VLA J.L. & ARTS 69 (1996); Roy Eugene Bates, *Private Censorship of Movies*, 22 STAN. L. REV. 618 (1970).

[62] *See Who: About Us,* THE CLASSIFICATION & RATING ADMINISTRATION (CARA), http://filmratings.com/who.html (last visited Feb. 15, 2016).

[63] *See* Deborah W. Denno, *Perspectives on Disclosing Rape Victims' Names*, 61 FORDHAM L. REV. 1113, 1113 (1993).

[64] For a discussion of the Supreme Court decisions invalidating government restrictions on movies, see Bates, *supra* note 61, at 620 n.17. For the Court's analysis of rape shield laws, see The Florida Star v. B.J.F., 491 U.S. 524 (1989); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

[65] *See generally*, John Fee, *The Formal State Action Doctrine and Free Speech Analysis*, 83 N.C. L. REV. 569, 577-87 (2005) (discussing Supreme Court's state action doctrine).

RTBF), such a ruling would not necessarily end the need for public debate over the wisdom of a policy that a company could adopt on its own accord.

2. *Technological Solutions: De-Ranking*

Google and other companies can also attempt to address the RTBF-free speech dilemma through a technological solution, such as the design of the algorithm for their search engines. Zittrain, while critical of a legal RTBF, suggested a technological solution: Search engines could allow people whose name matched a particular search to curate the first page of search results, but subsequent pages of that search would include all the other listings of links that the search currently generates.[66]

Another option I propose is for the search engine to program its algorithm to consider certain factors (e.g., private figure, victim of crime, etc.) that, if present, push the link to an article progressively lower and lower (i.e., "de-rank") from a search of a person's name that is contained in the article. In this way, the search results have a built-in "reverse chronological" order, in which the most recent articles tend to have priority in the search results.

A link to an old article could still be found from the search, but, over time, it would fall off the first page of search results and would progressively fall lower—for example, after seventy years, to page seven of the results of a search of a person's name. The "reverse chronological" option could be made either automatic or contingent on a request by that individual. For example, the algorithm could de-rank links to an article that identified a person as a victim of a crime of violence five or ten years after the article was published. The algorithm could provide an exception for public figures (whose names the algorithm could probably identify based on the sheer volume of references to the name online, although it would be harder if a private figure had the same name as a public figure). The search results could remain unaffected unless the person affirmatively requested to Google the de-ranking option.

In both Zittrain's and my solution, the change in algorithm does not remove the link to an article from a search result of a person's name. Instead, it de-ranks it from the first page of search results. My approach goes further than Zittrain's by de-ranking the link

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[66] *See* Zittrain, *supra* note 49. This idea is similar to the right of reply proposal by Frank Pasquale. *See* Frank Pasquale, *Asterisk Revisited: Debating a Right of Reply on Search Results*, 3 J. BUS. & TECH. L. 62 (2008).

progressively over time. The result under either approach is a compromise between privacy and speech: the person affected by the link will no longer have the story be one of the first search results people see in "googling" her name, but the public can still find the story with some diligence in scrolling through the search results. The de-ranking solution makes the story harder, but not impossible to find.

III. HOW GOOGLE CAN RECOGNIZE A LIMITED RIGHT TO BE FORGOTTEN IN THE U.S.

Now that we have examined a range of possible approaches to resolving the conflict between the right to be forgotten and the freedom of speech, it is worth evaluating whether any of the approaches would work in the United States. Without foreclosing the adoption of one of the other approaches, this final Part recommends that Google adopt a limited right to be forgotten for people in the United States as a matter of its user policy based on an incremental approach that recognizes the need for further study.[67] This approach offers a sensible way to implement such a right in the United States, while also respecting free speech interests.

A. *Google's Revenge Porn Precedent*

In June 2015, about one year after the *Costeja* decision, Google announced a big change to its user policy on removing links from Google searches. The change applied to people in the United States and elsewhere—specifically to victims of revenge porn.[68] Revenge porn occurs when a person publishes nude photos of an ex-lover to exact revenge. Female victims of revenge porn have reported experiencing harrowing ordeals from having nude photos of them follow them in Google searches of their names.[69]

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[67] It goes beyond the scope of this essay to evaluate each approach for the United States. I have selected one approach as a way to show how a right to be forgotten could easily be implemented, without violating the freedom of speech.

[68] Amit Singhal, *"Revenge Porn" and Search*, GOOGLE PUBLIC POLICY BLOG (June 19, 2015), http://googlepublicpolicy.blogspot.com/2015/06/revenge-porn-and-search.html.

[69] *See* Emily Bazelon, *Why Do We Tolerate Revenge Porn?*, SLATE, Sept. 25, 2013, http://www.slate.com/articles/double_x/doublex/2013/09/revenge_porn_legislation_a_new_bill_in_california_doesn_t_go_far_enough.html.

The change in policy marked an important shift in Google's approach. Google has been relatively unreceptive to any privacy requests by users to change search results, except for a limited class of personal information: signatures, bank accounts, and other sensitive ID information.[70] In those limited circumstances, Google will allow a delisting of a link from search results. Google has also allowed de-ranking of search results containing mug shots of people, as well as sites with repeated notices of copyright infringement.[71] Otherwise, Google tended to follow its credo of having its search "reflect the whole web."[72]

The change in policy for revenge porn illustrates how Google itself can implement a sensible policy recognizing a limited form of the right to be forgotten online for countries outside the EU. A month after Google announced its policy, Microsoft did the same for its search engine, Bing.[73] While some media characterized the move as "censorship,"[74] there was no public uproar or people clamoring for a right to access revenge porn. Thank goodness.[75]

I take it as a fair assumption that most people would agree with the soundness of Google's revenge porn policy. If this assumption is correct, then it establishes a useful precedent that shows that, in some

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[70] *See Search Help: Removal Policies, Personal Information*, GOOGLE, https://support.google.com/websearch/answer/2744324?hl=en (last visited Aug. 18, 2015).

[71] *See* Barry Schwartz, *Google Launches Fix to Stop Mugshot Sites from Ranking: Google's Mugshot Algorithm*, SEARCH ENGINE LAND (Oct. 7, 2013), http://searchengineland.com/google-launches-fix-to-stop-mugshot-sites-from-ranking-googles-mugshot-algorithm-173672; Danny Sullivan, *The Pirate Update: Google Will Penalize Sites Repeatedly Accused of Copyright Infringement*, SEARCH ENGINE LAND (Aug. 10, 2012), http://searchengineland.com/dmca-requests-now-used-in-googles-ranking-algorithm-130118.

[72] *See* Singhal, *supra* note 68 ("Our philosophy has always been that Search should reflect the whole web.").

[73] *See* Patrick Howell O'Neill, *Microsoft Joins Google in Censoring Revenge Porn*, THE DAILY DOT (July 22, 2015), http://www.dailydot.com/politics/microsoft-ban-revenge-porn-bing-xbox-live-onedrive/.

[74] *See* Associated Press, *Google Expands on Unprecedented "Censorship" Policy*, N.Y. POST, June 21, 2015, http://nypost.com/2015/06/21/google-cracks-down-on-revenge-porn/.

[75] As discussed above, there is no potential First Amendment violation, given the lack of state action in Google's voluntary policy.

circumstances, searches *should not* reflect the whole web and that people should have the ability to request removals of certain objectionable links from searches of their names.

B. *Moving Beyond Revenge Porn*

The revenge porn precedent raises the question whether there are other circumstances in which people should be allowed a right to be forgotten as a matter of Google's policy. This section proposes one additional situation and recommends further study on others. The idea would be that Google could learn from its experience in handling RTBF claims in the EU and identify whether certain classes of cases warrant a change to its removal policy in other parts of the world.

1. *Protecting Victims of Crimes*

Google should adopt a limited right to be forgotten for victims of domestic violence, rape, incest, kidnapping, sex trafficking, and other horrific or traumatic crimes. This approach adopts the catalog approach and sets forth specific circumstances in which the right to be forgotten will be recognized. It avoids the open-ended, case-by-case approach and the potential problem of arbitrary decisions.

Under its policy, Google should recognize a right for victims of crime to request links to articles, related to the crime they suffered, to be removed from searches of their names. The victims of such crimes should not have to endure articles about the crimes they suffered haunting them on Google for eternity. I do not give a full defense here for this victims' right, but I believe it comports with the goals of the longstanding victims' rights movement in the United States, which attempts to treat victims with fairness, respect, and dignity in the criminal process.[76] My proposal extends this goal to life beyond the criminal process, when victims may still suffer the consequences of the crimes they suffered.

Take, for example, Kiri Jewell. Starting at the age of ten, she was repeatedly raped for several years by Branch Davidian cult leader

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[76] *See* Symposium, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 294 (1999). For a history of the crime victims' rights movement in state and federal law, see Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims Into the Federal Rules of Criminal Procedure*, 2007 UTAH L. REV. 861, 865-70 (2007).

David Koresh in Waco, Texas.[77] Her rape was widely reported by the media due to her testimony before Congress regarding her ordeal.[78] Most of the links on the first page of a Google search of her name relate to her sexual abuse as a child—some of the articles are twenty years old.[79] Under my proposal, she would have a right to request that Google remove the links to these stories from a search of her name. This result still leaves all of her testimony before Congress and the articles about her and her rape online.[80] So a person could still discover information about Jewell's rape from a general search of the Davidian controversy or David Koresh,[81] but at least the rape would not be what defined her on Google.

2. *Further Study of Other Situations Warranting a Right to Be Forgotten and Other Relief*

Google and others should engage in further study of other situations that may warrant a right to be forgotten in the United States. The policy itself should incorporate a reflective, incremental approach that relies on study and reassessment of the policy over time. The government can also play an important role in making nonbinding recommendations to industries, as the Federal Trade Commission (FTC) currently does with its recommended fair information practice principles (notice, choice, access, and security)

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[77] *See* Linnet Myers, *Girl Tells of Molestation by Koresh*, CHI. TRIB., July 20, 1995, http://articles.chicagotribune.com/1995-07-20/news/9507200155_1_kiri-jewell-branch-davidian-waco.

[78] *Id.*

[79] *See id.*; *"Children of Waco" Speak Out*, ABC NEWS, Apr. 15, 2003, http://abcnews.go.com/Primetime/story?id=131982; TSShow, *Tom Snyder 950731 Seg 2 + WCBS Break*, YOUTUBE (Feb. 22, 2009), https://www.youtube.com/watch?v=mUTzNV9gx5I (interview of Kiri Jewell, her father, and her stepmother); Glenn F. Bunting & David Willman, *Waco Hearings Open; Girl Tells of Forced Sex*, L.A. TIMES, July 20, 1995, http://articles.latimes.com/1995-07-20/news/mn-26050_1_david-koresh.

[80] For example, a Google search of "David Koresh Congress" produced the same July 20, 1995 CHICAGO TRIBUNE article about Kiri Jewell as the last result on the first page of results. *See* Google (search: "David Koresh Congress") (last visited Aug. 25, 2015).

[81] *Id.*

for companies to adopt.[82] One study suggests that the FTC's fair information practice principles influenced the development of privacy policies, especially among large websites after the FTC's recommendation in 1999.[83] This example suggests that the FTC could develop a nonbinding RTBF recommendation that would influence the search engine market, which is dominated by a few large entities, especially Google.

I recommend that Google and policymakers consider several other situations for possible inclusion in a limited, voluntary right to be forgotten: (1) embarrassing photographs and comments involving minors on social media and (2) convictions that have been ordered expunged by a court. On the first issue, Google search chief Amit Singhal agreed that teenagers in the United States should have a right to be forgotten for some of their mistakes.[84] More controversial would be recognizing a similar right for adults. As discussed above, I also recommend that Google consider de-ranking search results (the "reverse chronological" order option), but not removing them in certain cases. For example, perhaps embarrassing content related to minors should receive a removal, whereas embarrassing content related to adults could receive only a de-ranking of the search results—the idea being that society affords kids greater leeway than adults.

CONCLUSION

The EU right to be forgotten is a new privacy right (or a new application of privacy to Internet search engines) that has sparked great controversy around the world. As more countries consider adopting such a right, the controversy will only intensify. This Essay is intended to map the various alternatives that countries and search engines have in reconciling the potential conflict between the RTBF and the free speech interest in access to information. The solutions are far more varied than the all-or-nothing assumption implicit in the

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[82] *See* Fed. Trade Comm'n, *Privacy Online: Fair Information Practices in the Electronic Marketplace, A Report to Congress* (2000), *available at* http://www.ftc.gov/reports/privacy2000/privacy2000.pdf (last visited Aug. 26, 2015).

[83] *See* Steven Hetcher, *The FTC as Internet Privacy Norm Entrepreneur*, 53 VAND. L. REV. 2041, 2047 (2000).

[84] Shara Tibken, *Google Search Chief: Users Have Right to Be Forgotten Online in Some Cases*, CNET, Oct. 8, 2015, http://www.cnet.com/news/users-have-the-right-to-be-forgotten-online-in-some-cases-google-search-chief-says/.

media's portrayal of the issue. In the conflict between privacy and free speech, there does not necessarily have to be a loser.